NO. 84-1891

In the Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT J. BRUNO
VERSUS
NEW ORLEANS DEPARTMENT OF POLICE

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

JURISDICTIONAL STATEMENT

Michael F. Barry
1005 Maison Blanche Bldg.
921 Canal St.
New Orleans, Louisiana 70112
Telephone: (504) 523-3957

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED

Whether regulation ASOP 75, paragraph 2 of the New Orleans Police Department, as promulgated and applied violates appellants Constitutional rights to vote, to travel, to equal protection of the law, to liberty, to attend the church of his choice, and to due process of the law.

TABLE OF AUTHORITIES

Page

Cases:

Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944) 12

Middle South Energy, Inc., v. Federal Energy Regulatory Commission, 747 F.2d 763 (D.C. Cir. 1984) 1, 4, 10

Municipal Light Boards of Reading and Wakefield Mass. v. Federal Power Comm'n, 450 F.2d 1341 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972) 12

Narragansett Electric Co. v. Burke, 119 R.I. 559, 381 A.2d 1358 (1977), *cert. denied*, *Burke v. Narragansett Electric Co.*, 435 U.S. 927 (1978) .....ll, 17

Papago Tribal Utility Authority v. FERC, 628 F.2d 235, (D.C. Cir., 1980) 4

Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978) 3, 6, 7, 8, 10, 11, 16

Statutes:

16 U.S.C. §824d (a) 6, 9 12
16 U.S.C. §824d (c) 6
16 U.S.C. §824d (d) 5
16 U.S.C. §824d (e) 4, 5
49 U.S.C. §15 (7) 3, 4, 5

Adminstrative Decisions:

Middle South Energy, Inc. Initial Decision, Docket No. ER82-616-000, 26 FERC (CCH) ¶63,044 (1984) 13, 14

TABLE OF AUTHORITIES

CASES:

Abington School District vs. Schempp, 375 U.S. 303 5

Another Look at Unconstitutional Conditions, 117 U. PA. L. Rev. 144 (1968) 5

Branifron vs. Department of Police, 362 So.2d 1221 (La. App. 4th Cir. 1978) 5

Bruff, Unconstitutional Conditions Upon Public Employment: New Departures in the Protection of First Amendment Rights, 21 Hastings L.J. 129 (1969) 6

Bruno vs. Department of Police, 451 So.2d 1082, 1088, (La. App. 4th Cir. 1984) 4

Cittadino vs. Department of Police, 434 So.2d 164, 167 (La. App. 4th Cir. 1983) 7

Crandell vs. Nevada, 6 Wall 35, 43-44 (1868) 6

Daniel vs. Department of Police, 426 So.2d 282 (La. App. 1983) 5

Division 241 Suscy, 538 F.2d 1264, 1266 (7th Cir. 1976) certiorari denied, 429 U.S. 1029, 97 S. Ct. 653, 50 L.Ed 2d 632 6

Dunn vs. Blumstein, 405 U.S. 330 5

Edwards vs. California, 314 U.S. 160 (1941) 6

Elrod vs. Burns, 427 U.S. 347 5,6

Garrity vs. New Jersey, 385 U.S. 493 (1967) 6

French, Unconstitutional Conditions: An Analysis, 50 Geo.L.J. 234 (1964) 5

TABLE OF AUTHORITIES (continued)

Huffman vs. Pursue, Ltd, Ohio 1975, 95 S.Ct 1200, 420 U.S. 592, 43 L.Ed 2d 482, rehearing denied 93 S.Ct. 1969, 421 U.S. 971, 44 L.Ed 2d 463 2

Imborne vs. Department of Police, 461 So.2d 1095 (La. App. 4th Cir. 1984) 5

Kelly vs. Johnson, 425 U.S. 238 5

Kent vs. Dullis, 357 U.S. 116, 126 (1958) 6

Marinovic vs. New Orleans Police Department, 422 So.2d 226 (La. App. 4th Cir. 1982) 5

NAACP vs. Button, 371 U.S. 415 5

New Orleans Waterworks Co. vs. Louisiana Sugar Refining Co., La. 18888, 8 S.Ct 741, 125 U.S. 18, 31 L.Ed 607 2

Pall vs. Virginia, 8 Wall 168, 180 (1869) 6

Passenger Cases, 7 How. 283, 492 (1849) 6

Perry vs. Sinderman, 408 U.S. 593 5

Peyton vs. New Orleans Police Department, 451 So.2d 1224 (La. App. 4th Cir. 1984) 5

Pienta vs. Villege of Schaumburg, 710 Fed.2d 1258 7th Cir. 1983) 5,6

Reboul vs. Department of Police, 420 So.2d 491, (La. App. 4th Cir. 1982) 5

TABLE OF AUTHORITIES (continued)

Shapiro vs. Thompson, 394 U.S. 618, 629)-631, 634 (1969) 5,6

Spevock vs. Klein, 385 U.S. 511 (1967) 6

United States vs. Girest, 383 U.S. 745, 758 (1966) 6

Van Alstyne, The Demise of the Right Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968) 5

Willem vs. New Orleans Police Department, 368 So.2d 1235 (La. App. 4th Cir. 1979) 5

Wyman vs. Bowers, 397 U.S. 49 (1970) 6

Wyman vs. Lopez, 404 U.S. 1055 (1972) 6

CONSTITUTION, STATUTE AND REGULATION

28 USC 1257 .....

Regulation ASOP 75, Paragraph 2 2

Civil Service Rule IX, Section 1.1 7

First Amendment to the United States Constitution 2

Fourtheenth Amendment, Section 5, to the United States Constitution 2

MISCELLANEOUS

Police Executive Research Forum and Police Foundation, Survey of Police Operational and Administrative Practices
Ch. 9 p. 67 (1981) 7

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

VINCENT J. BRUNO
VERSUS
NEW ORLEANS DEPARTMENT OF POLICE

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Civil Service Commission is not reported. The opinion of the Louisiana Court of Appeal affirming the Civil Service Commission is reported at 451 So.2d 1082. The opinion of the Supreme Court of Louisiana is reported at 462 So.2d 139.

JURISDICTION

The judgement of the Louisiana Surpeme Court denying that the regulations in question of the New Orleans Police Department were constitutional as promulgated and applied was entered on January 14,1985. A motion for rehearing was filed by appellant which was denied on February 21, 1985. The jurisdiction of this Court is invoked

under 28 U.S.C. 1257. *New Orleans Waterworks Co. vs. Louisiana Sugar Refining Co.*, La. 1888, 8 S.Ct. 741, 125 U.S. 18, 31 L.Ed 607; *Huffman vs. Pursue, Ltd., Ohio* 1975, 95 S.Ct. 1200, 420 U.S. 592, 43 L.Ed 2d 482, rehearing denied 93 S.Ct. 1969, 421 U.S. 971, 44 L.Ed 2d 463.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;...

The Fourtheenth Amendment, Section 5 to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Regulation ASOP 75, paragraph 2, of the New Orleans Police Department provides:

> A sick leave period commences at the time the member notifies the Desk Officer. A member on sick leave shall remain in his residence or other approved place of Confinement for the entire sick

> leave period, except to visit a physician, hospital, clinic, purchase meals or purchase medicine. The member shall notify his Unit of Assignment before leaving and upon returning from such a visit (exceptions below).

STATEMENT

1. This case involves the question whether certain regulations (as promulgated and applied) of the New Orleans Police Department (ASOP 75), which confine police officers on sick leave to the premises of his "sick leave" place of confinement, are repugnant to the United States Constitution; specifically whether said regulation denies police officers the equal protection of the laws, the right to liberty, the right ot travel, the right to vote, the right to attend a church of his choice, and the right to due process of the law.

The regulation was enacted to maintain morale, to protect the public fisc, and to prevent abuse of sick leave. The regulation in question provides:

> A sick leave period commences at the time the member notifies the Desk Officer. A member on sick leave shall remain in his residence or other approved place of Confinement for the entire sick leave period, except to visit a physician, hospital, clinic, purchase meals or purchase medicine. The member shall notify his Unit of Assignment before leaving and upon returning from such a visit (exceptions below.)

The Constitutional issues were first raised in the instant case on rehearing before Louisiana's Fourth Circuit Court of Appeal, and thereafter by writ to Louisiana's

Supreme Court.

2. The instant suit arose in 1979 when the appointing authority (Chief of Police) of the police department of the City of New Orleans, Louisiana, dismissed from the police force the appellant, police officer Vincent J. Bruno, on the grounds that he violated the sick leave regulation in question by failing to report absences from his place of sick leave confinement. The Civil Service Commission of New Orleans, which is the trial court in such cases, affirmed the dissmissal. The Appellate courts of Louisiana, the Fourth Circuit Court of Appeal and the Louisiana Supreme Court, also affirmed. Neither in the Circuit Court or the Supreme Court were the decisions unanimous.

Previous to his dismissal Officer Bruno served the New Orleans Police Department for thirteen years (only 3 more years necessary for retirement) without a blemish on his record.

At the time Bruno was dismissed, not only was he a veteran police officer, he was also president of the Police Association of New Orleans (PANO).

Bruno's problems began as the result of a police strike he called, which resulted in the cancellation of Mardi Gras in New Orleans. The only other time this had been done was during World War II. The dissenting opinion of Judge James Garrison, 4th Circuit Court of Appeal of Louisiana, best describes the scenario. *Bruno vs. Department of Police*, 451 So.2d 1082, 1088, (La. App. 4th Cir. 1984).

Bruno contends that the regulation in question is unconstitutional as promulgated and in application. Besides

denying Bruno certain fundamental rights, it also denies him and a similar class the equal protection of the laws, since a distinction has been made between police officers on sick leave and police officers on leave due to being injured on duty. *Imborne vs. Department of Police*, 461 So.2d 1095 (La. App. 4th Cir. 1984).

Moreover Bruno contends that his due process rights have been offended by the disproportionate application to him of the punitive aspects of the regulation. Bruno was dismissed while his colleague's were merely suspended for short periods, even though the offenses of all were basically equivalent in seriousness. See: *Peyton vs. New Orleans Police Department*, 451 So.2d 1224 (La.App. 4th Cir. 1984); *Willem vs. New Orleans Police Department*, 368 So.2d 1235 (La. App. 4th Cir. 1979); *Reboul vs. Department of Police*, 420 So.2d 491, (La. App. 4th Cir. 1982); *Daniel vs. Department of Police*, 426 So.2d 282 (La. App. 1983); *Cittadino vs. Department of Police*, 434 So.2d 164, 167 (La. App. 4th Cir. 1983); *Marinovic vs. New Orleans Police Department*, 422 So.2d 226 (La. App. 4th Cir. 1982); *Branifron vs. Department of Police*, 362 So.2d 1221 (La. App. 4th Cir. 1978).

A very similar regulation was held to be unconstitutional in the matter of *Pienta vs. Villege of Schaumburg*, 710 Fed.2d 1258 (7th Cir. 1983), but Louisiana's appellate courts disagreed with the federal appellate court that decided *Pienta*, Id. Moreover, *Pienta*, Id, was based upon *Dunn vs. Blumstein*, 405 U.S. 330, *Abington School District vs. Schempp*, 374 U.S. 203, *Shapiro vs. Thompson*, 394 U.S. 618, *NAACP vs. Button*, 371 U.S. 415, *Kelly vs. Johnson*, 425 U.S. 238, *Elrod vs. Burns*, 427 U.S. 347, all Supreme court decisions, whose rationale support the principal of *Pienta*, supra. See also *Perry vs. Sinderman*, 408 U.S. 593; French, Unconstitutional Conditions: An

analysis, 50 Geo.L.J. 234 (1964); Van Alstyne, The Demise of the Right Privilege Distinction in constitutional Law, 81 Harv. L. Rev. 1439 (1968); Note, Another Look at Unconstitutional Conditions, 117 U. Pa. L. Rev. 144 (1968); Bruff, Unconstitutional Conditions Upon Public Employment: New Departures in the Protection of First Amendment Rights, 21 Hastings L.J. 129 (1969).

THE QUESTION IS SUBSTANTIAL

The Courts of Louisiana have failed and refused to strike down a regulation promulgated by the City of New Orleans, Louisiana, which is repugnant to the United States Constitution on numerous grounds. The result is that , not only Bruno, but a similar class of police officers, have been or will be denied certain fundamental rights. The decision in Bruno if allowed to stand could be a detrimental precedent affecting the fundamental rights of all civil servants in the State of Louisiana and possibly the United States, since other jurisdictions may copycat the regulation in question.

Furthermore the regulation in question does not satisfy either the rational relation or the compelling interest tests usually determinative in justifying the denial of fundamental rights to a citizen. *Pienta*, supra at 1259 - 1262; *Division 241 Suscy*, 538 F.2d 1264, 1266 (7th Cir. 1976) certiorari denied, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed 2d 632; *Elrod vs. Bruns*, supra, *United States vs. Girest*, 383 U.S. 745, 758 (1966). See *Passenger Cases* 7 How. 283, 492 (1849); *Crandell vs. Nevada*, 6 Wall 35, 43-44 (1868); *Paul vs. Virginia*, 8 Wall 168, 180 (1869); *Edwards vs. California*, 314 U.S. 160 (1941); *Kent vs. Dullis*, 357 U.S. 116, 126 (1958); *Shapiro vs. Thompson*, 394 U.S.

618, 629-631, 634 (1969); *Wyman vs. Bowers*, 397 U.S. 49 (1970); *Wyman vs. Lopez*, 404 U.S. (1972); *Garrity vs. New Jersey*, 385 U.S. 493 (1967); *Spevock vs. Klein*, 385 U.S. 511 (1967).

Moreover the purpose of the regulation in question can be accomplished by other means, which do not deny police officers fundamental rights, and/or subject them to house arrest. For instance, according to the Police Executive Research Forum and Police Foundation, Survey of Police Operational and Administrative Practices Ch 9 p. 67 (1981) ninety (90%) percent of the nations police departments do not confine their employees to their home during sick or injury leave.

In addition, inherent in the punitive aspect of the regulation is the deterence necessary to accomplish the purpose of the regualation in question. Offending police officers, as provided for by Civil Service Rule IX, Section 1.1, may receive the following penalty: (1) removal from service (2) retirement (3) reduction in pay (4) demotion (5) suspension without pay for a maximum of 120 days (6) assessment of a fine.

Detection of any abuse of sick leave regulations may be accomplished by normal investigative procedures, which a police department should have expertise in, rather than denying police officers fundamental rights.

CONCLUSION

Probably jurisdiction should be noted.*

*(The Court may wish to consider summary reversal.)

Respectfully Submitted,

Michael F. Barry
1005 Maison Blanche Bldg.
921 Canal St.
New Orleans, Louisiana 70112
Telephone: (504) 523-3957

CERTIFICATE OF SERVICE

I certify that three (3) copies of the foregoing jurisdictional statement have been served on counsel for all parties by depositing same in the United States Mails, postage prepaid and properly addressed, this 21 day of May, 1985.

_____

Michael Barry